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RUDOLF VON GNEIST.*

Rudolf von Gneist was born in Berlin, August 13, 1816. His father, at that time *Justizcommissar* in the *Kammergericht*, was soon after transferred as *Landgerichtsrath* to Eisleben. There Gneist went to school, though in the meantime he spent several years with an uncle who was a country parson in Pomerania. In the fall of 1833 he went to Berlin to study law. After passing the first two state examinations in law and the doctor examination he became privatdocent at the University of Berlin, though he did not forsake the career of the law. In 1841 he was made assessor, and acted as assistant judge in the *Kammergericht* and *Obertribunal*.

His teaching was originally confined to Roman law, criminal law and procedure. He took an active part in all the political questions which agitated the time especially after the accession of Frederick William IV. Politics were even then of determining influence for his scientific efforts. One cannot do justice to the latter without considering his political life. His lectures on the publicity of judicial procedure and jury trials had not only a scientific, but an important political significance.

In 1844 he became Extraordinary Professor and in the following year published a work on formal contracts according to the Roman law of obligations, and a second upon jury trials. In the only field which then stood open for his political activity, the city council, of which he was a member, he familiarized himself with the practice of municipal self-government.

That he was defeated in the elections for the National Assembly, and for the second Chamber of the Diet which

* The MS. for this paper was furnished to the Academy contemporaneously with its appearance in the *Archiv für öffentliches Recht*.

was soon dissolved, and that he was thus prevented for the time being from appearing in a wider political arena, could only be advantageous for his subsequent career. He participated in the movements of 1848 and 1849, only in the modest positions of City Councillor and militia man, though, in several critical moments, he had an opportunity for a discreet and effective intervention.

His political views at that time corresponded to the prevailing liberalism, which with its constant reference to English models had been imported into Germany from France and Belgium. Even at that time far removed from the extravagances of the radicals, he hoped for a constitutional national life in Prussia, such as had been realized in the west European nations, and in a diluted form in the smaller German States. The German liberalism of the forties and fifties, with its unhistorical and mechanical conceptions of law and state, with its individualistic constructions based alone on reason, could confront no greater contrast than the pseudo-historic and romantic tendencies of Frederick William IV., behind whose aristocratic forms lay concealed the interests of the large landlords, just as those of the urban bourgeoisie lay back of liberal principles. After the storms of the Revolution the so-called conservative party again obtained the supremacy, and it can be readily understood, that Gneist withdrew not only from his political, but also his judicial activities, and devoted himself exclusively to his more theoretical occupation. It is to these years of retirement that he owed the ripening of his political ideas, that the world owes his epoch-making works on English public law, and to which the modern German state is indebted for the logical development of its self-government and its administrative jurisprudence.

After Montesquieu in his celebrated Chapter 6, of the 11th book of the "Spirit of the Laws," described the ideal picture of the English constitution as it never existed, and never could exist, England became the ideal of political

liberty for the people of the Continent. In an unparalleled victory, the constitutional doctrine had conquered, as a political creed, the educated classes of the Romanic nations. If in the German States a powerful monarchy and the remains of an aristocratic feudal social order often weakened the models which German liberalism adopted from France and Belgium, yet even Germany could not escape entirely from the wonderful magnetism of the constitutional political doctrine. In the storms of the Revolution, had not the mighty creation of the Hohenzollerns succumbed to it—the state, whose king only a year before had sworn that the paper of a constitution should never force itself in between him and his people?

Hardly, however, had Continental Europe entered into possession of the constitutions so ardently longed for, when a disappointment showed itself that became greater the more logically the constitutional theory was carried out. Struggles for the possession of power, and a party régime for maintaining it became the whole of public life. The strictest constitutional government, which France had ever had, succumbed to a street fight, to make place for the most violent class struggles between the wealthy and the poor.

Of all this nothing was seen in England. The maladministration and the defeat of the July monarchy in France, the partisan management of the administration in Prussia after the transition to the constitutional system, led both in France and Prussia to the conviction that the cause of this phenomenon must lie not in the constitution, but in the administration. Again as in the time of Montesquieu the people of the Continent looked to the peculiar state organism on the other side of the Channel, in which alone as it seemed, political liberty could be realized. If it were the foundation of the English constitution, the English administration, which prevented the evils of the constitutional system, it must be the foundation of the Continental constitutions, the administration derived from the absolute

state, which called forth those evils. The adoption of English public law seemed incapable of giving satisfaction, only because it had been a partial one, because it had been limited to the constitutional law, and had ignored the administrative law.

This was not a German but a general European movement. In France, de Tocqueville demonstrated that centralization of the administration was the historical cancer of the state, even in the days of the *ancien régime*, and he called for decentralization after English models. Likewise in Italy after its unification there was a strong movement led by Alfieri and Boncompagni in favor of regionalism instead of the Romanic centralization as the basis of the administration. Even if their notion of the nature of English administration as mere decentralization, was not very profound, yet even this was opposed to the spirit of the Romanic peoples. The movement has had no conspicuous success to show in any Romanic nation. That the result was different in Germany came from the fact, that the social and historical prerequisites were indeed different from those in the Romanic nations. To have opened the way for a proper recognition of this, and thus to have prepared the reform of the German administration is the imperishable merit of Gneist.

It was not a scientific but a practical need that led the student of Roman law into the field of public law; the German to the study of the English law. The results, however, were works of fundamental scientific importance, by which he disseminated a proper appreciation of English public law, not only on the Continent, but as the congratulatory addresses of the English universities on the fiftieth anniversary of his doctorate gratefully testify, in England as well.

He first utilized the results of his investigations in his lectures. In the year 1853 appeared a small work on "*Adel und Ritterschaft in England*" (Nobility and Baronage in

England). It was followed by his principal work, "*Darstellung des heutigen englischen Verfassungs und Verwaltungsrechtes*" (Exposition of Modern English Constitutional and Administrative Law), of which the first part appeared in 1857, the second in 1860. Separated later into three independent works, "*Die englische Verfassungsgeschichte*," (English Constitutional History), "*Das englische Verwaltungsrecht der Gegenwart*" (English Administrative Law of To-day) and "*Selbstverwaltung Kommunalverfassung und Verwaltungsgerichte in England*" (Self-government, Municipal Organization and Administration Courts in England), the book went through three editions.

The political and scientific influence of the work was tremendous. While previously both the liberal party with its demand for the greatest possible extension of the administrative rights of the elected communal legislatures, and the conservative party, with its desire for the maintenance of the manorial power, had alike called England to witness, they now saw before them, the English political system in its most concrete form. It was not the realization of one or another party doctrine in the legislation relating to administration, not the upholding of a party régime in the administration, which constituted the essence of the English administration, but the gratuitous service of the propertied classes in official positions and the non-partisan execution of the public law in the administrative courts. Involuntarily the appeals of both parties to English experience were silenced by this prosaic truth. None the less to carry out the principles of self-administration which were here seen in the most concrete shape, continued to be an end to be desired also for Germany in the confusion of the transition to a new legal order.

After Gneist at the beginning of the new era had been appointed, in 1858, Ordinary Professor at the University of Berlin, and had entered the House of Deputies, there appeared to open up before him a wide field for scientific

and political activity. The constitutional struggle which soon broke out unfortunately crippled Prussian legislation for half a decade. With his profound scientific insight into the necessary conditions of national existence, Gneist was far removed from the idea of the absolute rights of the popular representative body as regards the budget, which the radicals asserted. Later he opposed these views on several occasions in special monographs, such as "*Budget und Gesetz*," 1867 (Budget and Law), and "*Gesetz und Budget*" (1879). His position among the opponents of the government resulted from his scientific contention that the organization of the army, established after the Wars of Liberation, was based upon law, and hence could be changed only through a law. This is not the place to repeat the demonstration which I have elsewhere attempted, that this opinion was erroneous. In any case the attitude of Gneist to the question of the reorganization of the army, which at times assumed a character of unusual personal acrimony was based upon the honest conviction, that the preservation of the continuity of law was the supreme duty of the state.

Only after the great wars, when Prussia undertook the reorganization of its partially patrimonial and aristocratic, though essentially bureaucratic administration, could the results of Gneist's scientific investigations obtain practical concrete embodiment. He was untiring in rendering more generally accessible in shorter works the political conclusions of his great work. He deemed it the duty of the publicist, by constant repetition, to make his views the common and permanent property of the educated classes. It is to this effort that we owe the works on "*Verwaltung, Justiz, Rechtsweg, Staatsverwaltung und Selbstverwaltung nach englischen und deutschen Verhältnissen*" 1869, (Administration, Justice, Procedure, National Administration and Self-administration in English and German Conditions).

Nor could a more favorable time for the realization of Gneist's ideals have been found than the seventies. He was indeed the right man for the right time. The royal power derived from its successes a halo, and a moral strength, such as can rarely and then only temporarily be attained. As self-administration consists not in the privileges of special classes of society, but in their service for the state, this monarchy, as no other, was in a position to reject any attempt of society to rule the state, and to impose upon society the service of the state. The sharp contrast between the landed aristocracy who had hitherto lorded over the eastern part of the state in a patrimonial manner, and the capitalistic liberalism of the cities and the western provinces, precluded any understanding among the different parties and social classes as to any distinct method of ruling the state. A point of union could be found only in personal services for the state, in connection with an independent execution of the public law through a formal administrative jurisprudence.

The Prussian legislation on administration naturally took the course which in theory Gneist had demanded. There could be no question of a mechanical imitation of English institutions, the problem was to transplant the principles of self-administration and administrative jurisprudence that had developed in England, to German soil upon the basis of the conditions there given by historical growth. If it were not granted to Gneist to carry out the reform of the Prussian administration in the post of honor, as he had perhaps hoped, yet his political influence as a deputy was of most profound importance for its concrete embodiment. His appointment in 1876, as a member of the newly established *Oberverwaltungsgericht* (Supreme Administration Court) gave him an opportunity to participate in the execution and elaboration of this new branch of public law which to the last months of his life he always regarded as his most important duty. The high water

mark of Gneist's activity was reached in the seventies. As a politician he was no longer so high in popular favor as during the era of conflict, yet he had achieved the high political and scientific distinction of having transplanted into Germany self-administration and administrative jurisprudence, while in their mother country both disintegrated more and more and fell gradually into decay. This distinction cannot be lessened by the contemporaneous errors of the *Culturkampf*. It will remain a permanent credit to political science and the modern German state.

Beside this varied scientific and political activity, Gneist devoted a special interest to the German *Juristentag* (legal convention founded in 1860). In the lack of a common legislature, its meetings offered the only means for the discussion of legislative problems of general interest. With few exceptions he presided regularly after 1868, and until his last years conducted the assembly in a brilliant manner. He repeatedly submitted opinions to the *Juristentag*, thus in 1863 on the question whether a judge has to pass on whether a law has been constitutionally enacted, and later upon *jury trials*.

He maintained his interest for the *Juristentag* even after the latter had accomplished its mission and had become comparatively significant. Even at his last Whitsuntide outing, his chief thought was the spring meeting of the permanent commission.

Honors were plentifully heaped upon him in the last fifteen years of his life. When as he had frequently desired, the Prussian *Staatsrath* (Council of State) was assembled again in 1883 his appointment as a member was a matter of course. The numerous fiftieth anniversaries, which, beginning in 1886, it was his privilege to celebrate, particularly that of his doctorate on November 20, 1888, brought him from far and near testimonials of the most general recognition and veneration. At the fiftieth anniversary of his

official service he was appointed, *Wirkl. Geh. Ober-Justiz-rath* and on January 27, 1895, *Wirkl. Geh. Rath* with the title Excellency. To the brief reign of Frederick III. he owed his transfer to the nobility.

Up to the last years of his life he maintained a full and many-sided activity. At the desire of his family he abandoned his seat in the Reichstag and later in the Landtag, but he remained faithful to the University and the *Oberverwaltungsgericht*. He accompanied the burning political questions of the school law and the military law of 1892, with occasional writings, and we are indebted to the last two years of his life for the excellent monographs on the national legal concept of estates, the Prussian three-class system and the constitutional position of the Prussian ministry. To him life was labor and effort until the last moment. When early on the twenty-second of July, 1895, death called him away from his richly rewarded labors, there was left in the scientific life of Germany a gap, which was the more keenly felt as he was active to the end.

On the fiftieth anniversary of his doctorate Gneist himself declared that he had begun his scientific career as a faithful follower of the historical school. All his scientific works are built up on thorough historical investigations. In all his lectures he gave extensive historical introductions, and in public law these constituted indeed more than half the course. Yet his scientific equipment and endowment was by no means an historical one. The historic conception pervading all scientific thought which sees in all existing things the result of past and the basis of future development, the product at once of free human action and internal necessity, was in its essence foreign to him. At school he relates he had a peculiar liking for mathematics, and his talents turned chiefly to abstract reasoning. Like his great contemporary L. v. Stein, who showed these tendencies in an even more marked degree, he never entirely emancipated himself from the early influence of the philosophy of Hegel,

though he would hardly admit this to be the case. His lectures on penal law were in particular strongly influenced by Hegel.

This abstract tendency soon encountered contrary influences, and was thus preserved from a one-sided development. Gneist united himself with the then flourishing historical school and its influence was indeed strong enough to estrange him forever from the supposedly purely abstract constructions of law and state, of the philosophy of enlightenment and of modern radicalism. But its influence could not swerve him into the pseudo-historical paths of Christian German romanticism. In spite of his tolerance of opinions different from his own, he always had an intense dislike for Stahl. On the other hand he did not oppose a truly historical political doctrine to the false historical position of this small but powerful party, or to the entirely unhistorical doctrines of the dominant liberalism and radicalism. The general principles which he derived from English public law formed an essentially different system, that can be briefly characterized as social political doctrine.

The tendencies of Gneist in political science were influenced by the fact that he came into this field from his interest in politics, from a lively interest in the fate of his people at a time of great political transformations. It is simply impossible therefore to appreciate his scientific position without touching the political side of his activity. Each of his works on political science had not only a political tendency, but a direct political purpose. In this lies the strength and the weakness of his writings. They all breathe the political life which surrounded the author. Hardly any political relations and effects remained unconsidered, though every institution was considered in its organic connection with things. Yet one should not forget that the grouping had to serve political purposes. Writing as a politician the constructions and deductions of legal dogmatism are held in the background. The fixation of ideas left much to

be desired in rigidity. The great scientific standard bearer of self-administration did not give even a legal but only a political definition of it. For the modern constructive method which banishing all political considerations would treat public law according to the same purely logical principles as private law, Gneist, a politician, who saw the state in its lively organic connection, had no sympathy whatever. And yet he once allowed himself to be led into the same paths when he attempted to demonstrate from the provisions of the Landrecht the illegality of the confessional schools in Prussia. Had he followed his usual historical political method, he would have been led inevitably to the opposite conclusion by the consideration of subsidiary legal sources and the administrative practice.

His entire political doctrine, derived from the English public law, appears to be conceived from the point of view of internal policy. Especially in the foreign relations of states, direct conscious human action, the free workings of personality come to the foreground. Involuntarily the conviction here forces itself upon us that mankind makes history, while the greatest German historian goes further in saying that external history always controls the internal. His opinion is evidently one-sided, in that it takes no account of internal necessity, but it results in pragmatic history as a natural consequence of the one-sided consideration of external politics. Internal policy on the contrary chiefly includes the struggles of the government with the different social interests and of the latter among themselves. If, however, social life consists in the relations of mankind to external nature, then certain definite and permanent rules can be deduced for it just as well as for nature itself. Internal policy appears chiefly as the field of inherent necessity of development according to definite laws. This conception dominates Gneist's entire political system.

Shortly before the appearance of Gneist's great work, L. v. Stein had emphatically pointed out the significance of the

social factor for all historical development, in his "*Geschichte der sozialen Bewegung in Frankreich*" 1850 (History of the Social Movement in France), which soon established a world-wide reputation for the youthful author. He had demonstrated that the entire history of France from the great Revolution to the fall of the July monarchy had been distinctly social and had developed according to certain laws. Gneist transferred this idea to his exposition of the English administration, and furthermore deduced from it general principles of the state and society. In both is seen the inclination toward purely logical abstractions from general ideas, which they had inherited from the philosophy of Hegel.

The struggle of social interests dominates, therefore, the internal development of the states. As the social powers endeavor to subject to themselves the public powers, so conversely the state as the source of distributive justice must endeavor to break down any one-sided social rule, and yoke all social interests in its service. In this development definite rules will govern that can be deduced from the facts and scientifically formulated. But social development and hence state and society are not as materialism supposes based upon absolute necessity. The shaping of events is in part the free work of man. With a knowledge of the rules of social development events may be so shaped, that a definite result can be maintained according to these rules. Thus within the realm of social necessity the factor of human freedom of action comes into play. Law in general and public law in particular is therefore the expression of social power and is incomprehensible without a knowledge of the social factors on which it is based. But it is the result of free human action. Thus the conception of state and law, in spite of the one-sided social point of departure to which the perspective of internal politics had led him, approaches the historical concept and departs very far from that of modern materialism.

Only by thus accepting the possibility of free human action in the operation of the general laws of state and society, could Gneist think of utilizing the results of his investigations of English public law for the German state. His investigations were not merely to spread information in regard to the political conditions of one of the most important civilized nations of the world—in this connection England would demand our attention scarcely more than perhaps Italy or the United States. English law furnished him the most suitable means from which to deduce general propositions valid for modern Europe, concerning the relation of state and society, the duties of the state in face of one-sided class interests and the means of filling these duties. According to these propositions the long tried English methods of self-administration and administrative jurisprudence were to be transferred to Germany and established on the basis of existing conditions.

The definite political ideal which presented itself to him was to permeate all relations of public life with the consciousness of duty toward the state. It sounds perhaps absurd, but there is a certain truth in the statement, that the best informed student of English public law shares in the error of his great predecessor Montesquieu, in thinking that this ideal which he had formed for himself was actually realized in England. England was and is quite different from his notion of it. As the older Parliamentary system of England forms an analogy to the Continental estates, so the older self-government of England, which to Gneist is a model, formed merely the companion piece to the patrimonial administration of the Continent. The self-government of Gneist which is based on duty to the state and is permeated with the consciousness of this duty was first realized in Germany. The entire idea is purely German, specifically Prussian, and not at all English.

Self-government in this sense needs definite bearers. Gneist contemplated as such the propertied classes in city

and country in the widest extent. By the habitual conduct of public duties in municipal and national posts of honor, a governing class like the English gentry was gradually to be formed. The essential purpose of the self-administration was educational, the spirit was the same as that in which formerly the municipal ordinance of Stein had been issued. The self-administration, granted to the individual a participation in the administration not as a personal right but as a personal duty, that he should thus become accustomed to subordinate his demands on the state to the general interest. The realization of self-administration was accordingly nothing other than the reconciliation of state and society by the complete devotion of the latter to the service of the state.

However ideally the relation of state and society was here conceived, the German state of the present, more fortunate than Prussia in the great reform era of Stein and Hardenberg, carried out the principles of self-administration almost to their extreme logical consequences. Yet we must not be thereby deluded into thinking that the reconciliation of state and society has been effected. Two factors oppose it.

Self-administration demands capable bearers, and can therefore be supported only by the propertied classes. Thus the lower orders of society are excluded from the self-administration. But at the present it is they who make the social demands heard with emphasis before unknown. Gneist was as helpless in the face of this problem, as were the men of the reform era of Stein before the needed economic and financial reforms that were realized by Hardenberg. Gneist was essentially a bourgeois politician, not in the narrow spirit of the class interest of the French bourgeoisie, but in the spirit of the English and German middle classes always conscious of their social duties. He always had a warm heart for the welfare of the laboring classes, and showed it on every occasion. But a society which he placed in the service of the state naturally would cease with the propertied

classes. Though he recommends the employment of the lesser citizens in subordinate local offices, this is evidently not a solution of the social question. A further extension of self-administration could only afford an even greater opportunity than is already offered, for socialistic agitators to attain posts of authority.

Self-administration cannot in fact attain what is demanded of it. That it works more inefficiently than the professional officialism and thus is in danger of falling into the hands of the clerks is a matter of course. Its educational value ought not to be overestimated. Self-administration can moderate one-sided social claims, but the complete devotion of society to the state is opposed to the life principle of the former, is opposed to the egoistic nature of mankind. The pillar of the English self-administration, the justice of the peace, receives from Macaulay the very dubious praise that his justice is better than none at all. The German self-administration in part under the supervision of professional officials, and permeated by a profound sense of duty is doubtless much better than the English ever was. But it cannot impede the formation of purely social parties. It is among the bearers of the self-administration that we find the purely social organization of the *Bund der Landwirthe* (Agriculturists' Alliance). In face of the manifold social interests and social demands, the notion of self-administration is clearly inadequate.

Thus Gneist, who recognized only purely political parties as having any reason for existence, could not understand the new party formations in Germany and even allowed himself to participate in public declarations against them. He had recently treated the matter elaborately in his book on the national legal idea of estates.

Though self-administration has not attained those ideal aims which existed in the mind of Gneist, it is after all the essence of an ideal that it finds the limits of its practicability in the imperfection of all earthly things. No one would

venture to deny that self-administration and administrative jurisprudence are of the highest importance for the development of the modern state. To have clearly recognized and demonstrated the nature of both institutions is the imperishable achievement of Gneist as a teacher of public law. Not less is his importance as a politician. To thrash over the errors of the era of conflict and the *Culturkampf* may be left to those who feel themselves above the possibility of human error. The building up of the German administration in the manner he demanded is a permanent political achievement for the modern German state, even though England was not his model to the extent which he imagined.

More fortunate than his great predecessor Montesquieu he was able to see the realization of his ideals, though he was forced to admit also their partial inadequacy. And in the heaven of political science his star will blaze near Montesquieu's, the great Frenchman near the memorable German, both filled with the most lofty political ideals, both great in what they achieved of this ideal for the modern state, even when this ideal was wrong.

The picture of Gneist's activity would be incomplete, if we did not at this point devote a few words to the purely human side of his nature. Such description must necessarily be sketchy and inadequate. The ideals of a person often characterize him best. As his political ideal was permeated by the consciousness of duty so also was his personality. He could live only in the fulfillment of his duty even to the last minute. He held it moreover to be, above everything else, his duty to support decisively principles of which he was convinced. Yet on the other hand no one was freer from overestimation of himself, or belief in his personal infallibility. The strictest critic of his own views in scientific and political life he was constantly weighing and testing them, and had no hesitation in discarding them when he found them at fault. He never longed for the fame of those politicians who in all change of

the time, follow unmoved the same program for a generation. From this self-criticism arose his great tolerance for contrary views, even though they were personally opposed to him and though he had no sympathy with them. He declared that in this or that point people would always come to different conclusions. Differences of opinion never interfered with cordial personal relations.

We can only indicate here that it was granted him to have the happiest family life imaginable, a life so happy that it was proverbial among his intimates. The parting is, for this reason, so much the sadder. At the death of the greatest teacher of public law that Germany has had in the last century, we think not only of his work but of his personality. Though removed from our sight he will long be held in loving remembrance.

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